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PHOENIX, ARIZONA

June 11, 1973

DEPARTMENT OF LAW LETTER OPINION NO. 73-25-L (R-37)

REQUESTED BY: THE HONORABLE JAY C. STUCKEY
Arizona State Representative

QUESTION: May Arizona's Legislature lawfully delegate, with appropriate standards, the authority to determine amounts of "fees"?

ANSWER: Yes.

It is significant to note at the outset that contemplated in your request is the fact that, if the authority to determine amounts of fees were to be delegated to an administrative agency, the exercise of that authority would be required to be in accordance with Arizona's Administrative Procedures Act, A.R.S. §§ 41-1001, et seq.

It is assumed further, and such fact is emphasized, that the authority to be delegated would be in the nature of "fee-setting"--not "taxing". Arizona's Supreme Court reviewed the distinction at length in Stewart v. Verde River Irrigation and Power District, 49 Ariz. 531, 68 P.2d 329 (1937), and in its written opinion established the answers to the following two inquiries to be determinative:

> 1. Is the fee based upon the theory of paying the reasonable expenses to the state of furnishing the service, or is it fixed for the purpose of returning a surplus revenue to the state?
>
> 2. If the former be true, is the scale of payment in reasonable proportion to the services rendered?

In that regard, if the lawmaking authority to determine amounts of fees is delegated to an administrative agency, employment of language along the lines of the following is recommended:

> The administrative agency shall establish a schedule of fees for [detailed here should be the matters for which fees will be charged], so that the total annual income derived from such fees will approximate reasonably the anticipated budget of the agency. The amount established in each of the various categories of fees in the schedule shall be in a reasonable proportion to the services rendered.

In State v. Arizona Mines Supply Co., 107 Ariz. 199, 484 P.2d 619 (1971), Arizona's Supreme Court affirmed its liberal position with respect to the extent to which the lawmaking power may be delegated to an administrative agency. Specifically, the Court stated as follows:

> Under the doctrine of "separation of powers" the legislature alone possesses the lawmaking power and, while it cannot completely delegate this power to any other body, it may allow another body to fill in the details of legislation already enacted. . . .
>
> "'* * * We see, then, that while the Legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously do itself. Without this power legislation would become oppressive, and yet imbecile. . . .'" Peters v. Frye, 71 Ariz. 30 at 35, 223 P.2d 176 at 179 (1950).
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> Delegation of "quasi-legislative" powers to administrative agencies, authorizing them to make rules and regulations, within proper standards fixed by the legislature, are normally sustained as valid, and, barring a total abdication of their legislative powers, there is no real constitutional prohibition against the delegation of a large measure of authority to an administrative agency for the administration of a statute enacted pursuant to a state's police power. . . . (Original emphasis.) 107 Ariz. at 205.

Approximately one year ago, the Supreme Court of Washington, in Barry and Barry, Inc., v. Department of Motor Vehicles, 81 Wash.2d 155, 500 P.2d 540 (1972), held proper a legislative delegation to an administrative agency of the authority to promulgate a schedule of maximum fees for employment agencies. The court held specifically:

> . . . We hold that the delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power. . . . (Original emphasis.) 500 P.2d at 542, 543.

Arizona's Supreme Court announced substantially the same position in Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963). The Court held:

> A statute does not unconstitutionally delegate legislative power if it contains reasonably definite standards which govern exercise of power and if procedural safeguards in nature of right of review are provided. 93 Ariz. at 275.

The following language appears in the Supreme Court of Washington's written opinion in Barry and Barry, Inc., supra, and is applicable especially to the subject herein:

> We are convinced and have no hesitancy in saying that the strict requirement of exact legislative standards for the exercise of administrative authority has ceased to serve any valid purpose. In addition to lacking purpose, the doctrine in several respects impedes efficient government and conflicts with the public interest in administrative efficiency in a complex modern society.

* * *

> . . . [R]equiring the legislature to lay down exact and precise standards for the exercise of administrative authority destroys needed flexibility. Normally, the legislature meets only biennially. It does not have the opportunity to adopt a fee schedule and then alter it periodically to meet the changing needs of employment agencies and the public as revealed by administrative experience. In addition, it seems probable that various economic factors would affect any meticulously prescribed legislative standards, and it is doubtful that such standards could be attuned to coincide with these factors on a biennial basis. (Emphasis added.) 500 P.2d at 543.

On the basis of the authorities cited hereinabove, it is our opinion that the lawmaking authority to determine amounts of fees may be delegated to an administrative agency, as long as:

> 1. Guidelines are enacted to assure that a "fee" and not a "tax" is to be imposed (the guidelines contemplated herein would constitute also "reasonable definite standards", one of the requirements for a lawful delegation); and
>
> 2. Procedural safeguards in the nature of a right of review are provided.

The Legislature may wish to consider, and it is so recommended, that provision for periodic (e.g., annual) review of fee schedules by an administrative agency be required.

Informally, and in connection with this matter, we have been asked whether or not our opinion would be different if the administrative agency involved were a "90-10" agency. In that regard, the following apprehension was expressed:

> Since 10% of a "90-10" agency's revenue is paid into the general fund, (1) doesn't the "90-10" agency have to determine amounts of fees in excess of its anticipated expenses and, accordingly, (2) doesn't that result in a "tax" instead of a "fee"?

For the following reason, our opinion would be no different even if the administrative agency involved were a "90-10" agency.

Certain costs are involved in the operation of an administrative agency which are not covered, or paid for, by the 90% statutory appropriation inherent in a "90-10" agency. Examples of costs not covered are the services rendered by the Attorney General and the Department of Finance. We are informed that it is understood generally that the 10% which is paid into the general fund is intended to cover costs like those mentioned above, the precise ascertainment of which is extremely difficult if not impossible.

Respectfully submitted,

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The Attorney General

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